UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JOSEPH H. SUTTON,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 00-206-P-C***
	)	
DR. RAYMOND E. CULVER, et al.,)		
	)	
Defendants	***)***	

RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO PLAINTIFF'S MOTION TO ENFORCE SETTLEMENT

The plaintiff has asked this court by motion (Docket No. 5) to enforce the alleged settlement that is the subject of Counts II and IV of his complaint. Complaint (Docket No. 1) at 10, 11. An evidentiary hearing was held before me on April 10, 2001.

I. Proposed Findings of Fact

1. Defendant Raymond Culver inherited real estate located in Southport, Maine from Lenore Hilton. In 1997 he conveyed this real estate to himself and defendant Rhonda Rugan as joint tenants. Plaintiff's Exh. 1.

2. In the fall of 1999 Culver told the plaintiff, Joseph Sutton, that a purchase price of $900,000 for the property would be acceptable to him. After a discussion that took place at the home shared by the defendants, he and Sutton "wound up at $950,000" as the purchase price for the property. Rugan, although "very much involved in the decision to sell the property," according to Culver, was upset that no one had discussed the proposed sale directly with her and refused to sell her interest at this time.

3. In the spring of 2000, Culver contacted Sutton in Texas and told him that Rugan was closer to agreeing to the sale of the property.

4. Sutton retained an attorney in Maine, Hylie West, who prepared a purchase and sale agreement for the property at a price of $950,000 and worked with Warren Winslow, the attorney retained by Culver in March 2000, to resolve an issue concerning the description of the property included in the records of the probate of the Hilton estate.

5. Although Culver retained Winslow to negotiate the sale of the property and Winslow met once with both Culver and Rugan, Winslow did not represent Rugan. On April 18, 2000 Rugan retained Attorney Donald Eames with respect to the possible sale of the property.

6. Winslow requested a check for $1,000 from Sutton as earnest money for the purchase. He received the check and deposited it in his law firm's escrow account. These actions were authorized by Culver.

7. Culver and Rugan refused to sign the purchase and sale agreement drafted by West, and Winslow conveyed this refusal to West.

8. At a time after the defendants' refusal to sign and before May 8, 2000 Sutton conveyed to Culver a threat to sue to enforce what he believed to be an agreement to sell the real estate to him for $950,000.

9. In the spring of 2000, Sutton retained Attorney Leonard Gulino as litigation counsel with respect to the alleged $950,000 deal. Sutton recorded a notice of interest in the property in the Lincoln County Registry of Deeds on May 4, 2000. Plaintiff's Exh. 2, pp. 3-4. Gulino contacted Winslow by telephone and letter, Plaintiff's Exh. 2, at approximately the same time to discuss the possibility of litigation and resolution of the dispute without resort to litigation.

10. On or about May 18 or May 31, 2000[1] Winslow and Eames discussed the possibility of filing suit against Sutton as a "pre-emptive strike."

11. On June 5, 2000 Winslow conveyed to Gulino an offer to sell the property to Sutton for $995,000, all of which was to be paid in cash at closing on or before October 1, 2000, and on other terms identical to those contained in the purchase and sale agreement drafted earlier by Attorney West. Rugan and Culver had discussed the terms of this offer before it was made. Rugan testified that she agreed to the offer only as a "trial balloon" to see what Sutton's reaction would be and that she did not intend to be bound by the offer, but she did not testify that she so informed Eames or Winslow. Culver testified that Rugan was in fact willing to sell her interest in the property on these terms. Rugan discussed this offer with Eames and expected him to discuss it with Winslow; she did not care which of Winslow and Eames conveyed the offer to Gulino on her behalf.

12. Sutton, through Gulino, then made a counteroffer to purchase the property for $972,500, to be paid in full at closing on or before August 5, 2000.

13. Winslow conveyed this counteroffer to Culver, who authorized Winslow to reject the counteroffer and reiterate the terms of the June 5 offer. On June 12, 2000 Winslow spoke with Eames, who told Winslow that Rugan would accept the $995,000 deal. Eames testified, and I so find, the he had spoken with Rugan on that date before speaking with Winslow. *See also* Plaintiff's Exhs. 4 (Winslow bill to Culver; entries for 6/12/00), 9 (Eames bill to Rugan; entry for 6/12/00). Winslow then conveyed the rejection of the counteroffer and the reinstatement of the $995,000 offer to Gulino by telephone with a follow-up written confirmation transmitted by fax. Plaintiff's Exh. 5.[2]

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[1] Winslow's and Eames's bills to their clients show a telephone conversation on May 18 but no contact on May 31. Plaintiff's Exhs. 4 & 9. Winslow testified that this conversation took place "around" May 31.

[2] Rugan testified that she did not authorize Eames to return to the $995,000 offer after receiving Sutton's counteroffer at $972,500. Culver testified that he never authorized Winslow to put the $995,000 offer back on the table. To the extent that this testimony conflicts with that of Winslow and Eames, I find the testimony of the attorneys to be credible and reject that of Rugan and Culver.

14. Gulino faxed a letter to Winslow and Eames on June 13, 2000 at approximately 2 p.m. stating, *inter alia*, that he accepted the $995,000 offer on behalf of Sutton. Plaintiff's Exh. 6. Gulino received no communication revoking the offer before he sent this letter. Winslow had not communicated a revocation of the offer before he received this letter, nor had he been informed that either of the defendants had revoked the offer before he received the letter.

15. At 8:41 a.m. on June 13, 2000 Rugan faxed a handwritten letter to Eames in which she stated that she "wish[ed] to withdraw the offer that was made to Joseph Sutton," thanked Mr. Eames for his assistance, requested him to send a bill and directed him to forward any information he had regarding the matter to attorney David Van Dyke, thus effectively discharging Eames as her attorney. Plaintiff's Exh. 7. Eames did not contact Gulino after receiving the letter because he had been fired. He did talk to Winslow on June 13 at some point after receiving the fax from Gulino.

16. After receiving Gulino's letter on June 13, Winslow was informed by Van Dyke, who currently represents the defendants, that he had been fired by Culver. Culver is not sure when Winslow was fired, testifying that he went to Van Dyke on June 12, 13 or 14 and told him to fire Winslow, and that Winslow was fired at around the same time that Rugan fired Eames.

17. Van Dyke informed Gulino on June 14, 2000 that the defendants would not go forward with the $995,000 sale and intended to sue Sutton.

18. In July 2000 the defendants signed a purchase and sale agreement for the property with Margaret E. and F. William Helming at the price of $995,000. Mr. Helming has given Culver $10,000 toward legal expenses that Culver may incur in this action.

II. Recommended Conclusions of Law

1. The defendants do not contend that the alleged agreement to sell the property under the terms of the $995,000 offer was anything other than a settlement of an existing dispute, during the

course of which both sides had considered, and Sutton had threatened, filing suit against the other. Accordingly, the matter will be deemed to be appropriately before the court in the context of a motion to enforce a settlement. *See Quint v. A. E. Staley Mfg. Co.*, 1997 WL 33117190 (D. Me. Dec. 23, 1999), at *3 (court may require specific performance of oral agreement to settle a claim).

2. The parties agree that Winslow and Eames were required to have actual authority to extend the $995,000 offer to Sutton through Gulino in order for the offer to bind Culver and Rugan. Motion to Enforce Settlement (Docket No. 5) at 7; Defendants' Opposition to Plaintiff's Motion to Enforce Settlement, etc. (Docket No. 7) at 6-7. Counsel for the defendants also took this position in oral argument at the testimonial hearing. This is a correct interpretation of existing law. *See Michaud v. Michaud*, 932 F.2d 77, 80 & n.3 (1st Cir. 1991) (under federal law, attorney may make binding compromise if authorized by client to do so; Maine law apparently same, citing *Perkins v. Philbrick*, 443 A.2d 73 (Me. 1982)).

3. Winslow and Eames had actual authority to extend the $995,000 offer to Sutton through Gulino on June 5, 2000 and again on June 12, 2000. Rugan expected Eames to convey her position to Winslow; the fact that Winslow alone actually extended the offer makes it no less binding on Rugan.

4. When Gulino faxed the letter to Winslow and Eames accepting the $995,000 offer on June 13, 2000 no revocation of the offer had been communicated to him or to Sutton. A manifestation of intention not to enter into the proposed contract must be received by the offeree before the offeree's power of acceptance may be terminated. Restatement (Second) of Contracts § 42 (1981). Accordingly, Gulino's acceptance, made before the defendants' revocation of the offer had been conveyed to him, would, in the absence of other considerations, serve to create a binding and enforceable settlement agreement.

5. However, in addition to the statement that "on behalf of my client, Joseph Sutton, I write to accept the offer," Gulino's June 13 letter also includes the following statement, following an intervening paragraph:

> Acceptance of your clients' offer is made without waiver of Mr. Sutton's position that he already had an enforceable contract to purchase the property for $950,000. Unless accepted within five (5) days of the date of this letter, Mr. Sutton's acceptance of your offer will be deemed withdrawn, and Mr. Sutton will reassert his rights to enforce the contract at the price of $950,000.

Plaintiff's Exh. 6. The defendants contend that this is a conditional acceptance, so that no contract was formed because the condition was not satisfied. The plaintiff responds that the quoted language does not make the acceptance conditional and in addition that the quoted language is ambiguous, so that Gulino's testimony that the quoted language was "inartful" and intended only to emphasize the fact that Sutton reserved the right to insist on a sale at $950,000 must be considered by the court.

6. Maine law, which is applicable to this issue under the circumstances, provides:

> To create a contract, an acceptance must be unconditional. This requirement, however, does not invalidate every acceptance which contains a condition. For example, the offeree from an abundance of caution may condition his acceptance on a fact which would be implied in fact or in law from the offer.

Lamarre v. Cty of Biddeford, 34 B.R. 264, 265-66 (D. Me. 1983) (citations omitted). The Restatement (Second) of Contracts provides that "[a] reply to an offer which purports to accept but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but a counter-offer." Restatement (Second) of Contracts § 59 (1981).[3]

7. The fact that a statement of acceptance and a statement that may make that acceptance conditional do not appear together in the same sentence or paragraph of a single document does not

[3] The Maine Law Court has not specifically adopted this section of the Restatement. However, given its adoption of many other sections of the Restatement (Second) of Contracts, *e.g.*, *Guilford Transp. Indus. v. Public Util. Comm'n*, 746 A.2d 910, 914 (Me. 2000) (§ 202); *Daigle Commercial Group, Inc. v. St. Laurent*, 734 A.2d 667, 672 (Me. 1999) (§ 90), and the case law cited in *Lamarre*, it is reasonable to conclude that the Law Court will do so when the opportunity is presented.

affect the question whether the acceptance is conditional. *See Southwest Marine, Inc. v. State*, 941 P.2d 166, 173 (Alaska 1997). Similarly, the fact that the conditional language appears later in the document than a statement which otherwise would constitute an unconditional acceptance does not render either the former or the latter language ambiguous. When contract language is unambiguous, no extrinsic evidence concerning the intent or meaning of that language may be considered by the court. *Bangor Publ'g Co. v. Union St. Mkt.*, 706 A.2d 595, 597 (Me. 1998).

8. The "unless accepted" language in Gulino's June 13 letter is unambiguous on its face. Accordingly, his testimony concerning his intent in using that language may not be considered.

9. A requirement that an acceptance of the offer made in this case be in turn "accepted" within five days is not a condition that would be implied in law or in fact from the terms of that offer. As a lawyer, Gulino must have known that acceptance of an offer need not itself be accepted by the offeror in order to create a binding contract as a matter of law.[4] The only logical interpretation of Gulino's use of the word "accepted" in this context is that he meant to require that the defendants sign the purchase and sale agreement enclosed with his letter, to which the paragraph between his statement of acceptance and the quoted paragraph specifically refers. Accordingly, the quoted language must be deemed to have conditioned the plaintiff's acceptance on an additional term.

10. The requirement that Sutton's acceptance be in turn accepted by the defendants does not appear to be an alteration of a material term of the defendants' offer. Materiality has been a requirement mentioned in some of the case law interpreting section 59 of the Restatement. *See, e.g., Princess Cruises, Inc. v. General Elec. Co.*, 143 F.3d 828, 834 (4th Cir. 1998). However, the requirement is an additional term and its rejection, according to the unambiguous language of Gulino's

[4] Even if the "acceptance" of Sutton's acceptance contemplated by Gulino's letter is deemed to be the signing of the purchase and sale agreement enclosed with that letter, as suggested by the testimony, execution of a writing is not a condition implied in law with respect to an agreement to settle a dispute which both sides anticipate would otherwise lead to litigation.

letter, would result in the withdrawal of the offeree's acceptance. The illustration provided in comment a to section 59 of the Restatement makes clear that the inclusion of such a term in an acceptance makes that acceptance into a counteroffer.

> **Comment:**
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> a. *Qualified acceptance*. A qualified or conditional acceptance proposes an exchange different from that proposed by the original offeror. Such a proposal is a counter-offer and ordinarily terminates the power of acceptance of the original offeree. See § 39. The effect of the qualification or condition is to deprive the purported acceptance of effect. But a definite and seasonable expression of acceptance is operative despite the statement of additional or different terms if the acceptance is not made to depend on assent to the additional or different terms. See § 61 . . . . The additional or different terms are then to be construed as proposals for modification of the contract. . . . Such proposals may sometimes be accepted by the silence of the original offeror. See § 69.
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> **Illustration**:
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> 1. A makes an offer to B, and B in terms accepts but adds, "This acceptance is not effective unless prompt acknowledgement is made of receipt of this letter." There is no contract, but a counter-offer.

Restatement (Second) of Contracts § 59 comment a (1981). Here, Gulino's letter provides that Sutton's acceptance is not effective unless the defendants act to "accept" it within five days. While the language in Gulino's letter is not identical to that of the illustration, its effect is the same: the offeree seeks additional evidence that the offeror will be bound by his offer. The illustration thus provides additional support for the conclusion that Gulino's letter did not create a contract and that no enforceable settlement agreement exists.

III. Conclusion

For the foregoing reasons, I recommend that the plaintiff's motion to enforce a settlement agreement be **DENIED.**

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Date this 13th day of April, 2001.

David M. Cohen
United States Magistrate Judge

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